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Tuesday, July 17, 2007

Quo Warranto and the Presumption of Nonauthority

The current debate over statutory restrictions on the uses of the writ of *habeas corpus* should lead us to re-examine the foundations and context of that prerogative writ. The only explicit mention of it in the U.S. Constitution is in Art. I Sec. 9, as one of the restrictions on the powers of Congress:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

From this language we may reasonable conclude two important principles:

1. *Habeas corpus* may only be suspended by an act of Congress (which raises the question of what is to be done if Congress and the courts cannot convene).
2. *Habeas corpus* is presumed to be a right that precedes the Constitution and is incorporated by it, by restriction on when it may be suspended.

But if the writ of *habeas corpus* precedes the Constitution and is incorporated into it, does that make it one of the unenumerated rights of the Ninth Amendment, and if so, what about the other prerogative writs that have a similar status in common law, such as *quo warranto*, *mandamus*, *prohibito*, *procedendo*, and *certiorari*? We don't hear much about these in current jurisprudence, except the last, in discretionary appeals.

I have argued in a paper in progress, "Presumption of Nonauthority and Unenumerated Rights", at http://www.constitution.org/9ll/schol/pnur.htm , that all of those writs, and more, are indeed among the unenumerated rights of the Ninth Amendment, and that, contrary to current doctrine, these are not creatures of statute but fundamental rights that may not be constitutionally burdened. For evidence of this we can find among the proposed amendments from the New York ratifying convention not just a declaration of the writs as rights, but of a right to petition for the rights "in the name of the people", that is, as private attorneys general. That we have the rights was taken for granted. Only the standing of any person to petition for them was thought necessary to be asserted in an amendment.

Habeas corpus can be considered a subset of *quo warranto*. The former demands an official prove his authority to detain a person, but the latter demands an official, including a private official, prove his authority to do anything he may be doing or threatening to do,

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including holding an office. The former requires the official to produce the detainee in court. The latter requires him to suspend his activity until proof is made.

Was there ever a time, following the Declaration of Independence, which made the people the sovereign, when any individual could go to court with a petition for a writ of *quo warranto* and get an official activity suspended until that official proved his authority? Yes, there was, in the early republic, but so seriously did officials take the threat of such a writ that they took great care not to exceed their authority, so that the remedy almost never had to be carried forward, or precedents established. It should come as no surprise that officials don't like the right and have done almost everything they can to deny or deprecate it or make people forget about it.

Perhaps it's time to change that.

Most law schools don't teach much about the prerogative writs, not even *habeas corpus*. It should come as no surprise that many lawyers and judges are unclear on the concept or how it is supposed to work, if we followed the original standard of due oprocess. Too many judges treat a petition as an *ex parte* motion to show cause, with the burden on the petitioner. It is not. The writ is not an order from the court to produce the prisoner and the proof. The petition itself is the order to do that, much like a citation in a civil case, to respond to the filed petition. the writ is the finding by the court of whether the official has the authority, ordering release of the prisoner if he does not.

The only statutory component of *habeas corpus*, or the other writs, was a prescription of how much time the official has to comply. Originally, that ranged from three to twenty days, depending on the distance of the official from the court.

The question may arise, what happens if the court fails or refuses to hold a hearing, or accepts the authority of the official without the proof? This question is critical to an understanding of the role of courts in the Anglo-American legal tradition. The answer, by original standards of due process, is that the writ issues by default if the respondant fails to respond, or even if the court fails to hold a hearing. If the judge accepts the official's claim of authority without proof, then by those ancient standards, the judge himself may be removed from his position by a writ of quo warranto. In 18th century England this became a serious matter, and "peasants with torches and pitchforks" burning down courthouses and hanging judges was something that actually happened. If courts were derelict the people, as militia, took the law into their own hands, enforcing writs that by common understanding issued by default. But that process was not always so "due", and the line between militia enforcing the law and an enraged mob was often crossed.

We now live in an era of increasing tension between the judiciary and the public. This is a matter that deserves our constructive attention, or history could repeat itself.

Posted by Jon at 3:09 PM

3 comments:

nick said...

Great post, thanks! Alas, I won't have time to read your paper or respond to this in detail until August, but I've studied the history of the prerogative writs in medieval and Renaissance England, so I will make some observations much more informed by that than by what you have written.

The origin of these writs is that they were property-based writs -- writs of trespass (e.g. prohibitio) and writs of right (e.g. quo

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warranto) for political property (esp. for the rights to hold franchises such as private courts and enforcement powers).

You write: "contrary to current doctrine, these are not creatures of statute but fundamental rights that may not be constitutionally burdened"

This will require an interesting argument, since in England and up to 1776 in the U.S. the prerogative writs were generally seen as the king's writs, and it is often assumed that some entity (variously argued to be the States or the federal government) inherited such prerogatives of the king if anybody did.

But instead of just being the king's writs we can look on them as writs anybody who grants political property. Thus, for example, it would have been logically possible for the holder of a county palatine to issue analogs of these writs to their own franchisees (I didn't come across such a case, but then again I didn't search the records of the counties palatine).

One might make a Wilsonian argument that "we the people", not any government entity, inherited these rights in the U.S. But it might cause great practical problems to change from the grantor being able to bring a political writ of right (quo warranto) to any citizen being able to do so. Also there were ways to plead for the king to issue e.g. a prohibitio, and it was all actually done by the courts, so one could argue that the court itself is the only state entity that needs to be involved. (besides the official being challenged by quo warranto). I wonder if there are any real cases along these lines, perhaps from the Revolutionary War era. It does sound like a very good idea in theory, to be sure, but it may be one of those grand experiments we want to try on a small scale first.

4:29 PM

nick said...

"contrary to current doctrine, these are not creatures of statute but fundamental rights that may not be constitutionally burdened"

In my hasty comments I should at least note that I fully agree that these writs are not creatures of *statute*. They are writs that arose from the king granting private jurisdictions and other political powers to lords and corporations, and from the lords and corporations retaining such powers by prescription, and the need for English courts (mostly the king's courts, since these were mostly the king's grants) to resolve property disputes involving these political property rights. Parliament's role was tertiary for most of that history, despite the famous statute of Quo Warranto (limiting the power of the king to declare franchises forfeit under quo warranto) and a few similar forays.

However, it is a big step further to say that they are rights any citizen can sue for in court. I'd say offhand this is much more likely for trespass writs (e.g. prohibitio and habeus corpus) than quo warranto, since in medieval and Renaissance England only the king (and perhaps more generally an upstream grantor of the property right) could bring a quo warranto action. (Think of "prohibitio" as an as-applied challenge to jurisdiction by a party to a case -- a single case of trespass -- whereas quo warranto challenged the title to the entire property).

It would be a quite odd twist to treat a mythological entity like "we the people" as the upstream grantor, but many even less plausible legal fictions have been invented and proven to be useful, and to the extent this was actually the law in the U.S. it should be at least looked into. In any case at the end of the day it's proven history in solving disputes, not theoretical plausibility, that should win the day in law.

A very interesting and important topic indeed; more in August. :-)

4:55 PM

nick said...

me: "Wilsonian argument"

BTW that refers not to Woodrow Wilson but to James Wilson, one of the drafters of the U.S. Constitution and promoter of the idea

that "we the people," rather than either the States or the federal government, are "sovereign".

4:58 PM

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